Supreme Court, U.S.
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No. ____

IN THE
SUPREME COURT OF THE UNITED STATES

EL AMIN BASHIR,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The questions presented by this Petition are:

1. Whether Federal Rule of Appellate Procedure 28 supersedes the constitutional rule of direct appeal retroactivity of *Griffith v. Kentucky*.

2. Whether the Eleventh Circuit, contrary to the other circuits, correctly precludes review of *Blakely/Booker* error in cases in which the error was not raised on direct appeal until after the decision in *Blakely* but during the pendency of the direct appeal.

3. Whether the Eleventh Circuit, on remand from this Court for reconsideration in light of *Booker*, correctly held that it need not consider the merits of *Blakely/Booker* error on direct appeal when the error was not raised in initial briefs filed prior to the decision in *Blakely*.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, El Amin Bashir, respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Eleventh Circuit entered in this case on December 13, 2005.

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Eleventh Circuit appears at App. 1a-3a of this Petition and is unpublished, but is noted at 2005 W.L. 3420262. Previously, the Court granted certiorari, vacated the Eleventh Circuit's earlier judgment and remanded for reconsideration in light of *Booker v. United States*, 543 U.S. 220 (2005). The earlier judgment of the court of appeals at App. 4a-6a of this Petition and is unpublished but noted at 116 Fed. Appx. 241.

JURISDICTION

The court of appeals entered its judgment initially on July 15, 2004. A timely Petition for Rehearing was denied on November 9, 2004, and a copy of the Order Denying Rehearing appears at App. 7a-8a to this Petition. After the Court granted certiorari, vacated and remanded, the court of appeals entered judgment on December 13, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case requires interpretation and application of the Fifth and Sixth Amendments to the Constitution of the United States. The Fifth Amendment provides, in pertinent part:

> No person shall...be deprived of life, liberty or property, without due process of law....

The Sixth Amendment provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury....

STATEMENT OF THE CASE

A. The Basis for Jurisdiction Below

El Amin Bashir was convicted of conspiracy to possess with intent to distribute cocaine and attempting to possess with intent to distribute cocaine, in violation of 21 U.S.C. §§846 and 841(b)(1)(A) in the United States District Court for the Middle District of Florida. The basis of federal jurisdiction in the district court was under 18 U.S.C. §3231.

B. Facts Material to the Questions Presented

Mr. Bashir and others were charged in a two-count indictment with conspiring to possess with intent to distribute at least five kilograms of cocaine, and attempting to do so, in 2002. The case related to an undercover sting operation in which agents attempted to sell drugs to Bashir. The agents' interactions with Bashir were set up by an informer who served in that capacity despite his status on supervised release without the required permission of the sentencing judge to do so. Neither drugs nor money were produced, exchanged or displayed by anyone involved. The agents arrested Bashir after he refused to conduct a

transaction at a storage facility. Bashir's case was severed for trial from the original co-defendants.

By a special verdict form, the jury found Bashir guilty on both counts but found that the quantity of cocaine involved was less than five kilograms. The jury otherwise made no finding as to the drug quantity involved.

At sentencing, the Government argued that a drug quantity of ten kilograms should be attributed to Bashir for purpose of determining his sentence under the United States Sentencing Guidelines, and Bashir objected. At trial, though, the only evidence of discussions of a quantity other than ten kilograms was of a potential two kilogram deal. The district court concluded that a preponderance of the evidence supported a cocaine quantity between 3.5 kilograms and 5 kilograms because the jury had not found that more than five kilograms were involved. However, no evidence was presented of anyone having discussed a deal for any quantity between 3.5 and 5 kilograms. The district court, utilizing the sentencing guidelines as mandatory, imposed a sentence of 142 months imprisonment in light of its conclusion that the Petitioner was due to be sentenced at a sentencing guidelines level 30 and an uncontested criminal history category IV. A guidelines sentence based on less than 25 grams of cocaine would have been calculated at level 12, *see* U.S.S.G. §2D1.1(c)(14), resulting in a guidelines range of 21 to 27 months for Petitioner, U.S.S.G. §5A. A two-kilo finding also would have produced a guidelines range less than the sentence imposed. *See* U.S.S.G. §§2D1.1(c)(6), 5A.

On appeal to the Eleventh Circuit, Petitioner did not raise an argument in his initial brief under *Apprendi v. New*